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No. 98-208

In The

Supreme Court of the United States

October Term, 1997

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether punitive damages may be awarded in every case of intentional discrimination under Title VII, irrespective of whether there is egregious conduct.

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BRIEF IN OPPOSITION

Petitioner seeks punitive damages on the basis of evidence deemed insufficient by the trial court judge to justify even a basic liability finding. Armed with scant circumstantial evidence, petitioner asks to fashion a rule of law that would allow a jury unfettered discretion to award punitive damages in every Title VII case of intentional discrimination, focusing on the "discriminator's mental state"

(Pet. 12), rather than on conduct exhibiting "malice or...reckless indifference to federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, rejected petitioner's position that mere intent to discriminate is sufficient to impose punitive damages in a Title VII case. The court's holding that "punitive damages in a Title VII case may be imposed only on a showing of egregious conduct" (Pet. App. 2a) faithfully implements the statutory standard.

STATEMENT OF THE CASE

Petitioner filed a claim in the United States District Court for the District of Columbia under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, alleging that she was denied a promotion because of her gender. She relied primarily on evidence that a male employee had been "pre-selected" for the job in question. After the close of evidence, before the jury was instructed, the district court dismissed petitioner's claim for punitive damages (Pet. App. 45a). The jury found the respondent liable.

Respondent filed a post-trial motion to set aside the jury verdict. The district court issued a decision finding that "no direct evidence of sex-based motivation on the part of the ADA was presented" (Pet. App. 71a). The district court further found that the only circumstantial evidence favorable to the petitioner was that the male had been "pre-selected" for the job (*id.*). There was nothing about the pre-selection, however, that was suggestive of gender-based discrimination. "What was missing, for present purposes, is evidence even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler," the district court found (*id.*). Nonetheless, the district court ruled it was compelled by circuit precedent to allow the jury

verdict to stand (Pet. App. 73a-74a). The court stated: "Were it open to this Court to set aside the verdict under Fed. R. Civ. P. 50(c), however, this Court would do so" (Pet. App. 74a).

The court of appeals panel affirmed the district court's failure to set aside the jury verdict (Pet. App. 46a-49a), but reversed the dismissal of petitioner's claim for punitive damages. The panel ruled that evidence sufficient to prove intentional discrimination is also sufficient to allow the jury to decide punitive damages (Pet. App. 49a-53a).

Respondent's suggestion for rehearing *en banc* was granted, limited to the issue of punitive damages (Pet. App. 75a-76a). The *en banc* decision of the court of appeals affirmed the district court's dismissal of the punitive damages claim (Pet. App. 22a). The court held that in order to recover punitive damages, there must be a showing of egregious conduct (Pet. App. 2a). It found no such evidence in this case (Pet. App. 20a-21a, footnote omitted):

> The evidence in this case does not show the kind of egregious discriminatory conduct necessary for the imposition of punitive damages. As the district court noted, 912 F.Supp. at 14-15 [Pet. App. 71a-72a], the jury's finding of discrimination appears to have been premised largely if not exclusively upon its apparent rejection, as mere pretext, of ADA's proffered rationales - that Kolstad's legislative experience and writing skills were inadequate. Whether such a rejection, by itself, is enough to support an award of *compensatory* damages is a question for a different *en banc* proceeding, see *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997) vacated pending rehearing

en banc, 124 F.3d 1302 (D.C. Cir. 1997), but in this case it falls far short of supplying grounds for a punitive award.

The court of appeals also found that while evidence of pre-selection might permit an inference that the employer's proffered reasons for an employment decision were pretextual, "pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful" (Pet. App. 21a). It concluded that "pre-selection is relevant only insofar as it logically supports an inference of discriminatory intent, i.e., trivially at best" (Pet. App. 22a).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE STANDARD FOR PUNITIVE DAMAGES UNDER TITLE VII.

The petition presents the question in what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act. The courts uniformly agree that outrageous or egregious conduct is required for the award of punitive damages. There simply is no conflict among the decisions of the circuit courts of appeals on the standards for the award of punitive damages under Title VII.

The petition correctly states that the District of Columbia Circuit held that "punitive damages in a Title VII case may be imposed only on a showing of egregious conduct" (Pet. 9, *quoting* Pet. App. 2a). Petitioner incorrectly states that this holding conflicts directly with decisions of the First, Second, Eighth, and Tenth Circuits, and indirectly with decisions in the Fifth, Seventh and Ninth Circuits. All these courts recognize that egregious or outrageous conduct is required for the imposition of punitive damages under Title VII.

Petitioner relies principally on *Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997). There the court upheld the jury's award of punitive damages based on the finding that the defendant's discriminatory conduct was "egregious and its wealth such that a large award was necessary to punish and deter a corporation of this size." 110 F.3d at 222. The Second Circuit thus endorsed the element of egregiousness in a punitive damages award.

What the Second Circuit rejected was the proposition that punitive damages awards must be based on conduct that is "extraordinarily egregious." This language, taken from remarks by Senator Dole and Representative Hyde, was found to be inconsistent with the standard adopted by Congress. *Id.* at 220. The petition is in error in stating that the D.C. Circuit adopted the "extraordinarily egregious" standard in its decision (Pet. 10, *citing* Pet. App. 10a). On that page the court quoted the sponsors' interpretative memorandum stating that, under 42 U.S.C. § 1981, punitive damages may be awarded "*in egregious cases*." Pet. App. 10a, *quoting* 137 Cong. Rec. S 15483 (October 30, 1991). Earlier in the opinion, the court quoted Senator Dole's "extraordinarily egregious" comment, but its own words were that "Congress intended to establish an egregiousness requirement for punitive damages as a matter of law" (Pet. App. 7a). Therefore, the court below did not embrace the "extraordinarily egregious" standard rejected by the Second Circuit in *Luciano*.

For the same reason there is no conflict between the decision below and the decision in *Adakai v. Front Row Seat, Inc.*, 125 F.3d 861 (table), 1997 WL 603458 (10th Cir. 1997). The *Adakai* court's statement that defendant's acts need not be "extraordinarily egregious," 1997 WL 603548 at **2, is not inconsistent with the requirement that such acts need to be egregious for an award of punitive

damages. The court referred to the "requisite level of recklessness or outrageousness" required to support punitive damages, *id.*, and recited the evidence supporting the punitive damages award in that case. *Id.* at **3.

Neither is there a conflict between the decision below and the decision in *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997), on the standard for punitive damages under Title VII. The defendant in *Kim* argued that punitive damages awards under 42 U.S.C. § 1981a should be limited to "exceptional circumstances of unusual bad motive that transcends ordinary intentional conduct." 123 F.3d at 1065. The Eighth Circuit viewed this as an argument similar to the "extraordinarily egregious" standard rejected in *Luciano*, and concluded that the proposed standard would require that a "plaintiff must demonstrate something more than that required by the statute to recover punitive damages." *Id.* at 1065-66. As in *Adakai*, the court concluded that the "requisite level of recklessness or outrageousness" was met by the evidence in the case. *Id.* at 1066.

Similarly, there is no conflict between the D.C. Circuit and the First Circuit on the standard for the award of punitive damages under Title VII. In *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996), the court stated: "There is no vested right to punitive damages on the part of the plaintiff and where allowed, they are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future."

Petitioner argues that there is an indirect conflict between the decision below and decisions in other circuits by citing examples of types of evidence found sufficient to trigger the imposition of punitive damages (such as participation by higher management or engagement in duplicitous behavior), and by deducing that the case below

would have turned out differently in those other courts (Pet. 12-14). Petitioner's argument points up no conflict among the circuits on any rule of law relating to the standard for punitive damages under Title VII. Moreover, decisions from the Fifth, Seventh, and Ninth Circuits that petitioner includes as the balance of the "seven other circuits" said to be in conflict with the decision below all are in accord with the holding of the D.C. Circuit that egregious or outrageous conduct is required for an award of punitive damages under Title VII.

The Ninth Circuit requires "evidence of conduct more egregious than intentional discrimination to support an award of punitive damages in Title VII cases." *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998). In like manner, the Seventh Circuit has held that under Title VII "[p]unitive damages requires more" and presents a "higher hurdle than merely proving the underlying unlawful discrimination," and that once the higher hurdle is passed "the amount of punitive damages to which a plaintiff is entitled is determined by the degree of egregiousness of the underlying 'malice or reckless indifference'." *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996); *but see Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 581-82 (7th Cir. 1996). Both the Seventh Circuit and the Fifth Circuit have vacated punitive damages awards while upholding the finding of intentional discrimination, thereby negating petitioner's argument that evidence of mere intentional discrimination is sufficient to trigger the imposition of punitive damages under Title VII. *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1132-33 (7th Cir. 1997) (plaintiff "must go beyond proving" intentional discrimination to obtain punitive damages); *Farpella-Crosby v. Horizon Health Corp.*, 97 F.3d 803, 810 (5th Cir. 1996).

Two other circuits, not included in petitioner's conflict argument, also are in accord with the D.C. Circuit on the punitive damages standard under § 1981a. Pet. App. 19a; *see Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997) ("[p]unitive damages are an 'extraordinary remedy,' to be reserved for egregious cases"); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (evidence sufficient for basic liability finding "did not rise to the level" to support punitive damages).

Petitioner argues separately that the egregiousness requirement for punitive damages is inconsistent with the "reckless indifference" aspect of § 1981a (Pet. 12-13, 18-19). Petitioner states that the award of punitive damages turns "not on the particular type of discriminatory practice in which an employer may have engaged, but on the discriminator's mental state" (Pet. 12), and relies on the statement in *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987), that "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable." From this petitioner concludes that no additional requirement beyond intentional discrimination is necessary to put the punitive damages issue to the jury in every Title VII case.

The flaw in petitioner's argument is that it focuses on only one half of the equation in a punitive damages case under Title VII. The threshold in all cases is "intentional discrimination," 42 U.S.C. § 1981a(a)(1), so it is not remarkable that the same mental state required to prove liability might also furnish the basis for a punitive damages award.

But more than a certain state of mind is required for the award of punitive damages, whether based on malice or reckless indifference. The purpose of punitive damages is not to punish a defendant for a bad mental state, but to

punish him "for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Smith v. Wade*, 461 U.S. 30, 54 (1983), *quoting* Restatement (Second) of Torts § 908(1)(1979). In assessing punitive damages, "[t]he focus is on the character of the tortfeasor's conduct...." *Id.*

II. PRE-1991 CIVIL RIGHTS ACT AUTHORITY DOES NOT FURNISH A BASIS FOR GRANT OF THE PETITION.

Although 42 U.S.C. § 1981a, allowing the award of punitive damages under Title VII, was not enacted until the 1991 Civil Rights Act, petitioner argues that conflicts under pre-1991 authority compel the grant of the petition. Petitioner points to conflicts among the circuits as to the standard for punitive damages under 42 U.S.C. § 1981 (which unlike § 1981a, contains no reference to punitive damages), and argues that the decision below is in conflict with this Court's decision in *Smith v. Wade*, *supra*, a case arising under 42 U.S.C. § 1983.

The Court need look no further than the analysis in the majority *en banc* decision below for a sound explanation as to why the pre-1991 Civil Rights Act authorities do not demonstrate a conflict with regard to the standard for punitive damages under Title VII in the 1991 Act.

First, the court of appeals examined the case law under § 1981 before the passage of § 1981a, finding that four courts of appeals had held that egregious misconduct beyond mere intent to discriminate was required for punitive damages (Pet. App. 8a). Two other courts of appeals, the First and Seventh Circuits, had held before the passage of § 1981a that "a finding of intentional discrimination, without more, is enough to put the question of punitive damages before the jury in the usual § 1981 case." Pet. App. 8a-9a,

citing Rowlett v. Anheuser-Busch, Inc., *supra*; *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987). But both those courts have established a higher standard for punitive than for compensatory liability under § 1981a and, as noted above, have recognized that outrageous or egregious conduct is required to impose punitive damages under Title VII. *McKinnon*, *supra*; *Emmel*, *supra*; *see* Pet. App. 10a. Thus, the pre-1991 Civil Rights Act authority in the First and Seventh Circuits under § 1981 does not create a conflict with regard to punitive damages under § 1981a.

In a case in which certiorari was granted on the punitive damages standard under § 1981 and then later dismissed, the D.C. Circuit in *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C Cir. 1995), *cert. granted*, 116 S. Ct. 805, *dismissed after settlement,* 116 S. Ct. 1037 (1996), followed *Rowlett* in determining that "[n]o additional evidence is required" beyond proof of intentional discrimination in order to award punitive damages. Petitioner argues that the variance between *Barbour* and the decision below as to the punitive damages standard under § 1981 and § 1981a is inconsistent with the Congressional desire to apply a single standard to punitive damages claims under the civil rights laws (Pet. 15).

Whether the D.C. Circuit intends to conform its § 1981 analysis to the analysis in the decision below remains to be seen (though given the *en banc* decision that would seem more likely than the continued divergence scenario depicted in the petition). With respect to the question presented here, however, the D.C. Circuit is now aligned with other circuits in requiring evidence of outrageous or egregious conduct for punitive damages under Title VII, irrespective of whether there linger in a few circuits decisions under § 1981 imposing a lesser standard. Indeed, the conscious adoption of the outrageousness or egregiousness requirement under § 1981a by the D.C.

Circuit and those courts accepting a lesser punitive damages standard under § 1981 only reinforces the absence of a conflict on the standard in the statute which is the subject of the petition.

Second, the split among the circuits over the meaning of *Smith v. Wade*, relied upon in the petition (Pet. 17-18), essentially repeats the case division recited above with respect to § 1981 and thus similarly does not translate into a conflict on the punitive damages standard under § 1981a. The court of appeals meticulously catalogued all the references in *Smith* -- derived from common law, this Court's decisions, and the Restatement of Torts -- in favor of the requirement that punitive damages be based on outrageous or egregious conduct (Pet. App. 12a). The court also explained that the standard for compensatory damages in *Smith* already incorporated an egregiousness requirement, so there was not present the question of a higher evidentiary standard for punitive damages (Pet. App. 11a): "while the criterion adopted by the Court for punitive damages was not egregious in relation to the applicable compensatory standard, it clearly was so in relation to ordinary tortious conduct.... Thus the decision in *Smith* supports rather than refutes the idea that some form of egregiousness is essential for punitive damages."

Third, no conflict is presented by the decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), which rejected an egregiousness requirement for liquidated (double) damages due to "willful" violations of the ADEA. The court of appeals' observation that "liquidated damages under the ADEA and punitive damages under Title VII are not twins" (Pet. App. 15a) is litotes. Whereas Congress in § 1981a adopted language similar to that employed in *Smith v. Wade* (*see* Pet. 10a), there is no indication that Congress

meant to equate the ADEA's standard of willfulness with the standard for punitive damages under § 1981a.

III. THIS CASE PRESENTS NO ISSUE OF SUBSTANTIAL IMPORTANCE.

Petitioner argues that the case is important because a decision by this Court "will inform, if not control" the standard for punitive damages under § 1981 (Pet. 24). This Court once was presented the opportunity to address punitive damages under § 1981 and may have that opportunity again, in another case brought under that statute. But the instant petition is not the appropriate vehicle to resolve the standard under a different statute by indirect application. The consistent treatment by the courts of appeals of the punitive damages standard under § 1981a, the statute in question, counsels in favor of leaving for another day any residual conflicts under § 1981 regarding punitive damages.

Petitioner attempts to inflate the importance of this case by reference to the importance of the nation's civil rights laws (Pet. 25-26). The importance of laws prohibiting workplace discrimination is not in dispute. Yet even though petitioner incorrectly states that the court of appeals labeled this case "garden-variety" when it did not (Pet. 6, 25, *quoting* Pet. App. 18a), the factual context of this case punctuates the lack of merit of the petition and the lack of significance of the case.

This case does not present a close question on whether punitive damages should have been available. Indeed, had the district court judge not felt bound by circuit precedent to uphold the jury verdict, petitioner would not have prevailed on liability on the evidence of "pre-selection," "the only circumstantial evidence presented favorable to the plaintiff" (Pet. App. 71a). Petitioner did not prove "*to the Court's satisfaction* that her sex...had anything to do with

her rejection" (Pet. App. 74a). As the court of appeals pointed out, "pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful" (Pet. App. 21a). The preselection evidence inferentially supported a finding of discriminatory intent "trivially at best" (Pet. App. 22a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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